JD(ATL)–66–03
Jupiter, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

JUPITER MEDICAL CENTER PAVILION

and **CASES 12–CA–22478**
12–CA–22560
SERVICE EMPLOYEES INTERNATIONAL UNION, 199 FLORIDA, AFL–CIO, CLC **12–CA–22705**

Shelley Plass, Esq.,
for the General Counsel
Ms. Carnell Harrison,
for the Charging Party
Robert L. Norton, Esq. (Allen, Norton & Blue), of Coral Gables, Florida,
for the Respondent

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on August 18 and 19, 2003 in Miami, Florida. On August 21, 2003, I heard oral argument, and also on August 21, 2003, I issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Conclusions of Law, Remedy, Order and Notice provisions are set forth below.

[1] The bench decision appears in uncorrected form at pages 454 through 470 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification. Corrections include a clarification of my finding that Respondent's no–solicitation rule violated Section 8(a)(1) of the Act. Because the rule fails to distinguish between patient care areas and nonpatient care areas, and because its literal wording would bar advocating but not opposing unionization, I conclude that it is violative on its face. Additionally, I conclude that Respondent applied the rule in a discriminatory manner by allowing the wearing of buttons advocating some causes but not the wearing of buttons supporting the Union.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist engaging in such unfair labor practices and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B.

Additionally, Respondent should be ordered to rescind the unlawful no–solicitation rule and the unlawful rule prohibiting employees from discussing their wages and to delete these unlawful rules from its employee manual and any other announcements or summaries of its rules and policies which it provides to employees.

CONCLUSIONS OF LAW

1. Respondent, Jupiter Medical Center Pavilion, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Charging Party, Service Employees International Union, 1199 Florida, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a no–solicitation rule that (a) prohibited employees from advocating representation by or membership in a labor organization but did not prohibit employees from expressing opposition to union representation or membership; and (b) effectively prohibited employees from wearing buttons and other insignia expressing their views concerning the Union in nonpatient care areas of the facility.

4. Respondent violated Section 8(a)(1) of the Act by applying the no–solicitation rule described in paragraph 3, above, in a disparate manner by allowing employees to wear buttons advocating some causes but not informing employees that they could wear buttons espousing union representation and membership.

5. Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a rule which prohibited employees from discussing "their wages and rates with employees other than supervisor or Human Resources Department."

6.. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not engage in the unfair labor practices alleged in the consolidated complaint not specifically found herein.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

Respondent, Jupiter Medical Center Pavilion, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Promulgating, maintaining or enforcing any rule which effectively prohibits employees from wearing buttons or other insignia pertaining to representation by a labor organization in nonpatient care areas of Respondent's facility.

(b) Promulgating, maintaining or enforcing any rule which allows the expression of opinions against unionization or other protected concerted activity while prohibiting the advocacy of unionization or other protected concerted activity.

(c) Applying or enforcing a no–solication rule in any manner which restricts an employee's opportunity to discuss or express opinions about union representation and membership to a greater extent than it restricts the employee's opportunity to discuss and express opinions about any other subject.

(d) Promulgating, maintaining or enforcing any rule which prohibits employees from discussing their wage rates or other terms and conditions of employment with other employees.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful no–solicitation rule described in paragraph 1(a), above, and remove all references to it from the employee handbook and from all other rule announcements and summaries which Respondent directs to its employees.

(b) Rescind the unlawful rule described in paragraph 1(b), above, and remove all references to it from the employee handbook and from all other rule announcements and summaries which Respondent directs to its employees.

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

(c) Post at its facility in Jupiter, Florida, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated Washington, D.C.

Keltner W. Locke
Administrative Law Judge

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading **"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD"** shall read**, "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."**

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This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I find that Respondent violated Section 8(a)(1) but not 8(a)(3) of the Act.

Procedural History

This case began on September 6, 2002, when the Charging Party, Service Employees International Union, 1199 Florida, AFL–CIO, CLC, (which I will call the "Union") filed its initial unfair labor practice charge in Case 12–CA–22478. The Union later amended this charge.

On October 15, 2002, the Union filed an unfair labor practice charge in Case 12–CA–22560, and later amended this charge. On December 20, 2002, the Union filed an unfair labor practice charge in Case 12–CA–22705.

After an investigation, the Regional Director for Region 12 of the National Labor Relations Board issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on January 31, 2003. The Regional Director issued an Order Further Consolidating Cases, Consolidated Complaint and Notice of Hearing on February 26, 2003. I will refer to this latter pleading simply as the "Complaint." In issuing the Complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

Respondent filed a timely Answer to the Complaint.

On August 18, 2003, a hearing in this matter opened before me in Miami, Florida. The parties presented evidence on August 18 and 19, 2003. On August 21, 2003, counsel presented oral argument. Also on August 21, 2003, after a recess to consider the evidence and the parties' arguments, I am issuing this bench decision.

Admitted Allegations

Based on the admissions in Respondent's Answer and its stipulations during the hearing, I find that the government has proven the allegations raised by Complaint paragraphs 1(a) through 1(e), 2(a) through 2(c), 3, and 4. More specifically, I find that the government has established the filing and service of the unfair labor practice charges, as alleged.

Further, I find that Respondent is a Florida corporation operating a nursing home in Jupiter, Florida and that at all times material to this case, it has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act. Therefore, it is appropriate for the Board to assert jurisdiction. I also find that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Additionally, I find that at all material times, Administrator Jay Mikosch and Director of Nursing Linda Nelson have been Respondent's supervisors and agents within the meaning of Sections 2(11) and 2(13) of the Act, respectively.

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Complaint paragraph 7(a) alleges that on or about October 4, 2002, Respondent issued verbal and written discipline to Jermaine Paula Thimot. Respondent's Answer admits that it issued a written reprimand to Thimot on that date. I so find.

Additionally, Respondent's Answer admits the allegations raised in Complaint paragraph 7(b). Based on that admission, I find that on or about October 15, 2002, Respondent issued written discipline to Jermaine Paula Thimot.

Respondent has denied other allegations raised by the Complaint. I now turn to those controverted issues.

Disputed Allegations

On October 4, 2002, the Board conducted a representation election at Respondent's facility in Jupiter, Florida. The Union lost that election. The representation case has not been consolidated into this proceeding and therefore is not before me. However, facts about the Union's organizing campaign are relevant to the unfair labor practice allegations raised by the Complaint.

Complaint Paragraph 5(a)

Complaint paragraph 5(a) alleges that on or about September 5, 2002, Director of Nursing Linda Nelson directed employees to remove their Union buttons. Complaint paragraph 8 alleges that Respondent thereby violated Section 8(a)(1) of the Act.

Dieuseul Mirtil works for Respondent as a certified nursing assistant, or "CNA." He supported the Union in its organizing campaign and served as its observer during the election.

While at work on September 5, 2002, Mirtil wore a Union button on his uniform. The square button, about 2–1/4 inches on a side, stated:

LOCAL 1199 Florida
SEIU Stronger

Mirtil was in a patient's room providing care when Director of Nursing Nelson called him outside and told him to remove the button. According to Mirtil, he asked Nelson why, and Nelson said because he was "advertising for another company." According to Mirtil, he replied that the button had nothing to do with advertising, and Nelson answered that it might upset the patient.

Director of Nursing Nelson admitted telling Mirtil to remove the Union button on this occasion. However, she testified that she gave Mirtil two reasons for this instruction. She characterized her primary concern as patient safety, explaining that one of the square button's corners could cut the thin, fragile skin of an elderly patient.

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Although Mirtil's testimony does not directly and unequivocally corroborate Nelson on this point, it also does not explicitly contradict her. Based on my observations of the witnesses, I conclude that Nelson's testimony is reliable and that she did raise the patient safety issue with Mirtil on this occasion.

Nelson also testified that she gave Mirtil a second reason for her instruction to remove the button. She told Mirtil that the button was "advertising" because it had the name of something other than the company on it. I conclude that Nelson was alluding to the no–solicitation/no–distribution rule which Respondent published in its employee handbook. That rule states, in part, as follows:

> Solicitation is defined as any act of urging or persuading of individuals, by peaceful or other means, to accept a product or service for sale, a doctrine to follow, or an organization to join. An act of urging or persuading can be precipitated through oral or written communication, or by the wearing of any article which bears the name, insignia or other identifying symbol of a product, service or organization.
>
> No solicitation of, or by, employees is permitted on Jupiter Medical Center premises during working time. No unauthorized distribution of literature or other printed matter is permitted in work areas on Medical Center premises. Any solicitation and/or distribution of literature which may, in any way, interfere with safety, patient care or effective operations is prohibited.

Mirtil testified that he has seen other employees wear buttons on their uniforms. These buttons display messages such as "God Bless America" and "I Love Jesus." According to Mirtil, these buttons typically were smaller than the Union button which Nelson asked him to remove, and employees wore these smaller buttons on their identification badges.

Based on my observations of the witnesses, I credit Mirtil's testimony on this point, which is essentially uncontradicted. Accordingly, I find that Respondent at least acquiesced in the wearing of buttons with messages such as "God Bless America" and "I Love Jesus."

Additionally, the record establishes that Respondent allowed an employee to wear a larger button referring to a hospital, Jupiter Medical Center, which is near the Respondent's nursing home. The button stated:

> Jupiter Medical Center
> #1
> Preferred Hospital

The record suggests that Jupiter Medical Center and Respondent's facility – Jupiter Medical Center *Pavilion* – may share common ownership. Even if true, that fact would not affect my analysis of the issue raised by Complaint paragraph 5(a).

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In general, a health care facility may prohibit solicitations in patient care areas, including corridors and treatment rooms. See *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979). For this reason, and because Mirtil had been in a patient's room and providing care when Director of Nursing Nelson called him aside and told him to remove the Union button, I conclude that Nelson's action was lawful.

Additionally, although I am not totally convinced by Respondent's argument concerning the possibility that the button could cut a patient's skin while the CNA was moving the patient, this argument is not totally implausible. Indeed, in issues involving patient safety, it is better to err on the side of caution. Therefore, I conclude that Respondent had the right to prohibit Mirtil from wearing the button and recommend that the Board not find that Respondent violated the Act as alleged in Complaint paragraph 5(a).

This finding, however, does not mean that the more general rule, appearing in the employee handbook, is lawful. This rule prohibits solicitations on Respondent's premises on working time without distinguishing between patient care and nonpatient care areas. The lawfulness, or unlawfulness of this rule will be discussed further later in this decision.

Complaint Paragraph 5(b)

Complaint paragraph 5(b) alleges that in or around late September/early October 2002, on a date not more specifically known, Respondent's Director of Nursing Nelson impliedly threatened employees with discharge because they assisted and supported the Union. Complaint paragraph 8 alleges that Respondent thereby violated Section 8(a)(1) of the Act.

During the union organizing campaign, Respondent conducted a number of meetings of employees during which it presented its arguments against the union. At one of those meetings, employee Jermaine Paula Thimot, also known as Paula Thimot, told management, in the presence of other employees, that management treated the employees "like shit."

According to Thimot, Director of Nursing Nelson observed "Paula, you seem to be unhappy here." To that, Thimot replied "You'd be unhappy, too if you had to work under these conditions."

Thimot testified that Nelson then stated "maybe this isn't the place for you" and observed that there were a lot of jobs "out there." Although Nelson's account differs in some respects, it generally corroborates Thimot. I find that she did suggest that if Thimot were unhappy, perhaps she should find other employment.

In some instances, circumstances will provide a context in which an ambiguous statement carries a threatening message. A comment that an employee perhaps should find another job can constitute a threat if, under the circumstances, employees would reasonably interpret it as a warning of discharge.

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In the present case, however, no evidence establishes that Respondent made any other more explicit statement which would make an employee fearful of being discharged. Therefore, I do not interpret Nelson's ambiguous comment as a threat to discharge Thimot. Therefore, I recommend that the Board dismiss the allegations in Complaint paragraph 5(b).

Complaint Paragraph 5(c)

Complaint paragraph 5(c) alleges that on or about October 4, 2002, Director of Nursing Nelson threatened employees with discharge because they assisted and supported the Union. Complaint paragraph 8 alleges that Respondent thereby violated Section 8(a)(1) of the Act.

On October 4, 2002, the day of the election, Director of Nursing Nelson sent word that she wanted to speak with Paula Thimot at the end of Thimot's shift. During this meeting, Nelson discussed two topics with Thimot.

Thimot had switched shifts with another employee without notifying Respondent in accordance with its established procedure. Additionally, Thimot had signed a sheet stating she would work an extra shift, but then failed to do so. Stated another way, Thimot had volunteered to work two 8–hour shifts "back to back," but at the end of the first shift, she just left, leaving the facility shorthanded. The record leaves little doubt that Thimot actually had committed these infractions of Respondent's rules.

Based on my observations while Thimot was testifying, I do not conclude that she is a reliable witness. For example, while testifying about an encounter she had with another employee, Thimot depicted herself as calm and not raising her voice. However, even during her testimony, when she described this particular incident her voice became louder and more strident. In other respects, her demeanor as a witness did not inspire my confidence in her testimony and, to the extent it conflicts with that of other witnesses, I do not credit it.

Instead, based on the testimony of Nelson, whom I credit, I find that Respondent did not engage in the conduct alleged in Complaint paragraph 5(c). Therefore, I recommend that the Board dismiss these allegations.

Complaint Paragraph 6(a)

Complaint Paragraph 6(a) alleges that at all material times, Respondent has maintained a rule which prohibits employees from wearing union buttons or other union insignia. Complaint paragraph 8 alleges that Respondent thereby violated Section 8(a)(1) of the Act.

In discussing the allegations in Complaint paragraph 5(a), I quoted relevant portions of this rule, which appears in Respondent's employee handbook. Clearly, the rule included within its definition of "solicitation" the wearing of a union button. Thus, the rule defines

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"solicitation" to include "any act of urging or persuading individuals" and states that such an act "can be precipitated" by wearing any "article which bears the name, insignia or other identifying symbol of a product, service or organization." A Union button certainly falls within that definition.

Employees wear other buttons on their uniforms without being required to remove them. Arguably, a button saying "God bless America" or "I love Jesus" does not identify a "product, service or organization." However, such messages do fall within the rule's general definition of solicitation, because they certainly urge the acceptance of "a doctrine to follow, or an organization to join."

By condoning these messages, Respondent has applied its no–solicitation rule in a way which allows employees to communicate their views on matters which do not fall within the protection of the Act but which discourages employees from communicating their views on matters which do come within the Act's protection. Moreover, this disproportionate impact on Section 7 rights is not limited to the wearing of buttons. The rule explicitly defines solicitation to include *any* act of urging or persuading individuals.

In this regard, the no–solicitation rule does not exist in isolation but as one of a number of workplace rules. Reasonably, an employee would understand the gravamen of the no–solicitation rule by considering it in the context of Respondent's other rules.

As will be discussed later in this decision, Respondent also has promulgated a rule prohibiting employees from discussing their wage rates with each other. Taken together, the rule prohibiting employee discussion of wages and the selective application of the no–solicitation rule reasonably would have a broad chilling effect on the exercise of Section 7 rights.

In sum, I conclude that Respondent's no–solicitation rule, as applied, violates Section 8(a)(1) of the Act. Additionally, in two other ways, the same rule violates Section 8(a)(1) on its face.

Although the rule limits the prohibition to "working time," it does not distinguish between patient care areas and nonpatient care areas. By its terms, it prohibits solicitation on "Jupiter Medical Center premises" and thus applies to all of the facility, including nonpatient care areas. As written, the rule forbids solicitation in employee locker and rest rooms, staff lounges, break rooms and other areas where only employees, and not patients, would be present. Thus, the rule is overly, and unlawfully broad.

Moreover, the rule defines solicitation to be persuasion to "*accept* a. . .doctrine to follow, or an organization to join." (Emphasis added) Thus, by its literal terms, the rule prohibits both advocating the principle of collective–bargaining and persuading someone to join a labor organization, but it does not prohibit expressions of opposition to collective–bargaining and union membership.

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In sum, both on its face and as applied, Respondent's no–solicitation rule interferes with, restrains and coerces employees in the exercise of their Section 7 rights. For all these reasons, I recommend that the Board find that this rule violates Section 8(a)(1) of the Act.

Complaint Paragraph 6(b)

Complaint paragraph 6(b) alleges that at all material times, Respondent has maintained a rule which prohibits employees from discussing their wages and rates with one another. Complaint paragraph 8 alleges that Respondent thereby violated Section 8(a)(1) of the Act.

It is uncontroverted that Respondent has established a rule prohibiting the "discussion of employee wages and rates with employees other than supervisor or Human Resources Department." Respondent argues that the rule has not been enforced and therefore constitutes a de minimis violation.

In *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992) the Board, citing *Heck's, Inc.*, 293 NLRB 1111, 1119 (1989) and *Waco, Inc.*, 273 NLRB 746 (1984), stated:

> Thus, *Heck's* and *Waco* make dear that the finding of a violation is not premised on mandatory phrasing, subjective impact, or even evidence of enforcement, but rather on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act.
>
> 307 NLRB at 94.

Therefore, the nonenforcement of the rule does not make it any more lawful. Further, the record does not establish that Respondent has rescinded the rule. Therefore, I reject the argument that this rule is a de minimis violation and recommend that the Board find that it violates Section 8(a)(1) of the Act.

Complaint Paragraph 7(a)

Complaint paragraph 7(a) alleges that on or about October 4, 2002, Respondent issued verbal and written discipline to employee Jermaine Paula Thimot. Complaint paragraph 9 alleges that Respondent thereby violated Sections 8(a)(1) and 8(a)(3) of the Act.

Respondent admits giving Thimot a warning on October 4, 2002. In analyzing the lawfulness of this action, I will apply the Board's test articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such

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activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

The record clearly establishes that Thimot engaged in Union activities and that Respondent knew about her Union sympathies. She was quite outspoken on this subject at employee meetings. The record also establishes that she suffered an adverse employment action. The timing of this action, on the day of the election, as well as Respondent's violative rules, establish a link between the protected activities and the adverse employment action. Therefore, I conclude that the General Counsel has satisfied all for *Wright Line* elements.

However, I further conclude that Respondent has established that it would have imposed the same discipline in any case. Thimot's failure to follow company policies concerning her presence at work clearly had an impact on operation of the nursing home and on the wellbeing of the elderly residents. I find that these failings are so serious, and the penalty imposed – just a written warning – so relatively minor that it would have resulted even in the absence of protected activities. Therefore, I recommend that the Board dismiss the allegations in Complaint paragraph 7(a).

Complaint Paragraph 7(b)

Complaint paragraph 7(b) alleges that on or about October 15, 2002, Respondent issued written discipline to employee Jermaine Paula Thimot. Complaint paragraph 9 alleges that Respondent thereby violated Sections 8(a)(1) and 8(a)(3) of the Act.

The evidence establishes that Director of Nursing Nelson issued Thimot a written warning on October 15, 2002 for a number of serious failings in patient care. Most notably, she left incontinent patients soaked with urine without changing them.

I reject as implausible the argument that because the patients were on diuretic medicine, there was no way to keep all of them dry to the end of the shift. That might be true with respect to one patients, but when a number of patients are all wet, it becomes clear that the CNA has not been doing her duty.

Performing a *Wright Line* analysis similar to that for Paragraph 7(a), I conclude that the General Counsel has proven all four *Wright Line* elements. However, I further conclude that Respondent would have given a warning to any CNA who let patients lie in their own urine.

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Considering that Respondent has a "five star" rating – the highest – by the authority which accredits nursing homes, and considering that Thimot's immediate supervisor, Tanya Conley, was a diligent nurse who imposed high standards on her staff, I have no doubt that Thimot would have received a written warning in any event. Therefore, I recommend that the Board dismiss the allegations in Complaint paragraph 7(b).

Conclusion

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

The hearing is closed.

B E N C H D E C I S I O N

(Time Noted: 2:30 p.m.)

JUDGE LOCKE: On the record.

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's rules and regulations.

I find that Respondent violated Section 8(a)(1), but not Section 8(a)(3) of the Act.

P R O C E D U R A L H I S T O R Y

This case began on September 6, 2002, when the Charging Party, Service Employees International Union, 1199 Florida, AFL-CIO, CLC, which I will call the Union, filed its initial unfair labor practice charge in Case 12-CA-22478. The Union later amended this charge.

On October 15, 2002, the Union filed an unfair labor practice charge in Case 12-CA-22560, and later amended this charge.

On December 20, 2002, the Union filed an unfair labor practice charge. After an investigation, the Regional Director for Region 12 of the National Labor Relations Board, issued an Order consolidating cases, Consolidated Complaint and Notice of Hearing on January 31, 2003.

The Regional Director issued an Order further consolidating cases, Consolidated Complaint and Notice of Hearing on February 26, 2003. I will refer to this later pleading simply as the Complaint.

In issuing the Complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the General Counsel, or as the Government. Respondent filed a timely answer to the Complaint.

On August 18, 2003, a hearing in this matter opened before me in Miami, Florida. The parties presented evidence on August 18 and 19, 2003. On August 21, 2003, counsel presented Oral Argument. Also on August 21, 2003, after a recess to

consider the evidence and the parties' arguments, I am issuing this Bench Decision.

A D M I T T E D A L L E G A T I O N S

Based on the admissions in Respondent's answer and its stipulations during the hearing, I find that the Government has proven the allegations raised by Complaint Paragraph 1a through 1e, 2a through 2c, 3, and 4.

More specifically, I find that the Government has established the filing and service of the unfair labor practice charges, as alleged.

Further, I find the Respondent is a Florida corporation, operating a nursing home in Jupiter, Florida, and that at all times material to this case, it has been an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Therefore, it is appropriate for the Board to assert jurisdiction.

I also find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Additionally, I find that at all material times, Administrator Jay Mikosch, and Director of Nursing, Linda Nelson, have been Respondent's supervisors and agents within the meaning of Sections 2(11) and 2(13) of the Act, respectively.

Complaint Paragraph 7a alleges that on or about October 4, 2002, Respondent issued verbal and written discipline to Jermaine Paula Thimot. Respondent's answer admits that it issued a written reprimand to Thimot on that date. I so find.

Additionally, Respondent's answer admits the allegations raised in Complaint Paragraph 7b. Based on that admission, I find that on or about October 15, 2002, Respondent issued written discipline to Jermaine Paula Thimot.

Respondent has denied other allegations raised by the Complaint. I now turn to those controverted issues.

D I S P U T E D A L L E G A T I O N S

On October 4th, 2002, the Board conducted a representation election at Respondent's facility in Jupiter, Florida. The Union lost that election.

The representation case has not been consolidated into this proceeding and, therefore, it is not before me. However, facts about the Union's organizing campaign are relevant to the unfair labor practice allegations raised by the Complaint.

C O M P L A I N T 5A

Complaint Paragraph 5a alleges that on or about September 5, 2002, Director of Nursing Linda Nelson directed employees to remove their Union buttons. Complaint Paragraph 8 alleges that Respondent thereby violated Section 8(a)(1) of the Act.

Diesuel Mirtil works for Respondent as a certified nursing assistant, or CNA. He supported the Union in its organizing campaign, and served as its observer during the election.

While at work on September 5, 2002, Mirtil wore a Union button on his uniform, a square button about two and one-fourth inches on the sides, stating Local 1199 Florida, SEIU stronger.

Mirtil was in a patient's room providing care when Director of Nursing Nelson called him outside and told him to remove the button. According to Mirtil, he asked Nelson why, and Nelson said because he was "advertising for another company."

According to Mirtil, he replied that the button had nothing to do with advertising, and Nelson answered that it might upset the patient.

Director of Nursing Nelson admitted telling Mirtil to remove the Union button on this occasion. However, she testified that she gave Mirtil two reasons for this instruction.

She characterized her primary concern as patient safety, explaining that one of the square button's corners could cut the thin, fragile skin of an elderly patient.

Although Mirtil's testimony does not directly and unequivocally corroborate Nelson on this point, it also does not explicitly contradict her.

Based on my observations of the witness, I conclude that Nelson's testimony is reliable and that she did raise the patient safety issue with Mirtil on this occasion.

Nelson also testified that she gave Mirtil a second reason for her instruction to remove the button. She told Mirtil that the button was advertising because it had the name of something other than the company on it.

I conclude that Nelson was alluding to the no solicitation/no distribution rule, which Respondent published in its employee handbook.

That rules states in part as follows: "Solicitation is defined as any act of urging or persuading of individuals by peaceful or other means to accept a product or service for sale, a doctrine to follow, or an organization to join.

"An act of urging or persuading can be precipitated through oral or written communication, or by the wearing of any article which bears the name, insignia, or other identifying symbol of a product, service, or organization.

"No solicitation of or by employees is permitted on Jupiter Medical Center premises during working time. No unauthorized distribution of literature, or other printed matter, is permitted in work areas on Medical Center premises.

"Any solicitation and/or distribution of literature, which may in any way interfere with safety, patient care, or effective operations is prohibited."

Mirtil testified that he has seen other employees wear buttons on their uniforms. These buttons display messages such as, "God Bless America," and "I Love Jesus."

According to Mirtil, these buttons typically were

smaller than the Union button, which Nelson asked him to remove. And employees wore these smaller buttons on their identification badges.

Based on my observations of the witnesses, I credit Mirtil's testimony on this point, which is essentially uncontradicted. Accordingly, I find that Respondent at least acquiesced in the wearing of buttons with message such as "God Bless America," and "I Love Jesus."

Additionally, the record establishes that Respondents allowed an employee to wear a larger button referring to a hospital, Jupiter Medical Center, which is near the Respondent's nursing home. This button stated, "Jupiter Medical Center Number 1 Preferred Hospital."

The record suggests that Jupiter Medical Center and Respondent's facility, Jupiter Medical Center Pavilion, may share common ownership. Even if true, that fact would not affect my analysis of the issue raised by Complaint Paragraph 5a.

In general, a health care facility may prohibit solicitations in patient care areas, including corridors and treatment rooms. See NLRB versus Baptist Hospital, Inc., 442 U.S. 773 (1979).

For this reason, and because Mirtil had been in a patient's room providing care when Director of Nursing Nelson called him aside and told him to remove the Union button, I conclude that Nelson's action was lawful.

Additionally, although I am not totally convinced by

Respondent's argument concerning the possibility that the button could cut a patient's skin while the CNA was moving the patient, this argument is not totally implausible.

Indeed, in issues involving patient safety, it is better to err on the side of caution. Therefore, I conclude that Respondents had the right to prohibit Mirtil from wearing the button, and recommend that the Board not find the Respondent violated the Act, as alleged in Complaint Paragraph 5a.

This finding, however, does not mean that the more general rule appearing in the employee handbook is lawful. This rule prohibits solicitations on Respondent's premises on working time without distinguishing between patient care and non-patient care areas. The lawfulness or unlawfulness of this rule will be discussed further later in this decision.

C O M P L A I N T P A R A G R A P H 5B

Complaint Paragraph 5b alleges that in or around late September, early October 2002, on a date not more specifically known, Respondent's Director Of Nursing Nelson impliedly threatened employees with discharge because they assisted and supported the Union. Complaint Paragraph 8 alleges that Respondent thereby violated Section 8(a)(1) of the Act.

During the Union organizing campaign, Respondent conducted a number of meetings of employees, during which it presented its arguments against the Union.

At one of those meetings, employee Jermaine Paul Thimot, also known as Paula Thimot, told management in the presence of other employees, that management treated the employees, "like shit."

According to Thimot, Director of Nursing Nelson observed, "Paula, you seem to be unhappy here." To that Thimot replied, "You'd be unhappy too if you had to work under these conditions."

Thimot testified that Nelson then stated, "Maybe this isn't the place for you," and observed that there were a lot of jobs, "out there."

Although Nelson's account differs in some respects, it generally corroborates Thimot. I find that she did suggest that if Thimot were unhappy, perhaps she should find other employment.

In some instances, circumstances will provide a context in which an ambiguous statement carries a threatening message.

A comment that perhaps an employee, perhaps, should find another job could constitute a threat if, under the circumstances, employees would reasonably interpret it as a warning of discharge.

In the present case, however, no evidence establishes that Respondent made any other more explicit statement, which would make an employee fearful of being discharged.

Therefore, I do not interpret Nelson's ambiguous comment as a threat to discharge Thimot. Therefore, I

recommend that the Board dismiss the allegations in Complaint Paragraph 5b.

C O M P L A I N T P A R A G R A P H 5C

Complaint Paragraph 5C alleges that on or about October 4, 2002, Director of Nursing Nelson threatened employees with discharge because they assisted and supported the Union. Complaint Paragraph 8 alleges that Respondent thereby violated Section 8(a)(1) of the Act.

On October 4, 2002, the day of the election, Director of Nursing Nelson sent word that she wanted to speak with Paula Thimot at the end of Thimot's shift.

During this meeting, Nelson discussed two topics with Thimot. Thimot had switched shifts with another employee without notifying Respondent, in accordance with its established procedure.

Additionally, Thimot had signed a sheet stating she would work an extra shift, but then failed to do so. Stated another way, Thimot had volunteered to work two eight-hour shifts back-to-back, but at the end of the first shift she just left, leaving the facility short handed. The record leaves little doubt that Thimot actually had committed these infractions of Respondent's rules.

Based on my observations while Thimot was testifying, I did not conclude that she is a reliable witness. For example, while testifying about an encounter she had with another employee, Thimot depicted herself as calm and not raising her voice.

However, even during her testimony, when she described this particular incident, her voice became louder and more strident.

In other respects, her demeanor as a witness did not inspire my confidence in her testimony, and to the extent it conflicts with that of other witnesses, I do not credit it.

Instead, based on the testimony of Nelson, whom I credit, I find that

Respondent did not engage in the conduct alleged in Complaint Paragraph 5c. Therefore, I recommend that the Board dismiss these allegations.

C O M P L A I N T P A R A G R A P H 6A

Complaint Paragraph 6A alleges that, at all material times, Respondent has maintained a rule, which prohibits employees from wearing Union buttons or other Union insignia. Complaint Paragraph 8 alleges that Respondent thereby violated Section 8(a)(1) of the Act.

In discussing the allegations in Complaint Paragraph 5a, I quoted relevant portions of this rule, which appears in Respondent's employee handbook. Clearly, the rule included within its definition of solicitation, the wearing of a Union button.

Thus, the rule prohibits wearing an "article, which bears the name, insignia, or other identifying symbol of a product, service, or organization." A Union button certainly falls within that definition.

Employees wear other buttons on their uniforms without being required to remove them. Arguably a button saying, "God Bless America" or "I Love Jesus," does not fall within the definition of a button identifying a product, service, or organization.

However, such messages do fall within the rule's definition of solicitation, which is, "Any act of urging or persuading of individuals to accept a product, or service, or sale, a doctrine to follow, or an organization to join."

Therefore, I conclude that Respondent's rule allows

discrimination against the Union message and, therefore, is overly broad on its face.

Although the rule limits prohibition to working time, it does not distinguish between patient care areas and non-patient care areas. Therefore, I recommend that the Board find that this rule violates Section 8(a)(1) of the Act.

C O M P L A I N T P A R A G R A P H 6B

JUDGE LOCKE: Complaint Paragraph 6b alleges that at all material times, Respondent has maintained a rule, which prohibits employees from discussing their wages and rates with one another. Complaint Paragraph 8 alleges that Respondent thereby violated Section 8(a)(1) of the Act.

It is uncontroverted that Respondent has established a rule prohibiting the "discussion of employee wages and rates with employees other than supervisor or Human Resources Department."

Respondent argues that the rule has not been enforced and, therefore, constitutes a de minimis violation.

In Radisson Plaza, Minneapolis, 307 NLRB 94 (1992), the Board citing Hex, Inc., 293 NLRB 1111-1119 (1989), and Waco, Inc., 273 NLRB 746 (1984), stated:

"Thus Hex and Waco make clear that the finding of a violation is not premised on mandatory phrasing, subjective intent, or even evidence of enforcement. Rather, on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act," 307 NLRB at 94.

Therefore, the non-enforcement of the rule does not make it any more lawful. Further, the record has not established that Respondent has rescinded the rule. Therefore, I reject the argument that this rule -- the de minimis violation, and recommend that the Board find that it violates Section 8(a)(1) of the Act.

C O M P L A I N T P A R A G R A P H 7A

Complaint Paragraph 7a alleges that on or about October 4, 2002, Respondent issued verbal and written discipline to employee Jermaine Paula Thimot. Complaint Paragraph 9 alleges that Respondent thereby violated Sections 8(a)(1) and 8(a)(3) of the Act.

Respondent admits giving Thimot a warning on October 4, 2002. In analyzing the lawfulness of this action, I will apply the Board's test articulated in Wright Line, 251 NLRB 1083 (1980), enf'd 622 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 at 1982.

Under Wright Line, the General Counsel must establish four elements by a preponderance of the evidence.

First, the Government must show the existence of activity protected by the Act.

Second, the Government must prove that Respondent was aware that the employees are engaged in such activity.

Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action.

Fourth, the Government must establish a link or nexus between the employee's protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the Respondent must -- Respondent bears the burden of showing that the same action would have taken place even in the absence of protected activity. Wright Line, 251 NLRB 1083 at 1089.

See also Manno Electric, Inc., 321 NLRB 278, 280 at Footnote 12 (1996).

The record clearly establishes that Thimot engaged in Union activities, and that Respondent knew about her Union sympathies. She was quite outspoken on this subject at employee meetings.

The record also establishes that she suffered an adverse employment action. The timing of this action on the day of the election, as well as Respondent's violative rules, establish a link between the protected activities and the adverse employment action.

Therefore, I conclude that the General Counsel has satisfied all four Wright Line elements.

However, I further conclude that Respondent has established that it would have imposed the same discipline in any case.

Thimot's failure to follow company policies concerning her presence at work clearly had an impact on operation of the nursing home, and on the well being of the elderly residents.

I find that these failings are so serious, and the penalty imposed, just a written warning, so relatively minor that it would have resulted even in the absence of protected activity. Therefore, I recommend that the Board dismiss the allegations in Complaint Paragraph 7a.

C O M P L A I N T P A R A G R A P H 7B

Complaint Paragraph 7B alleges that on or about October 15, 2002, Respondent issued written discipline to employee Jermaine Paula Thimot. Complaint Paragraph 9 alleges that Respondent thereby violated Sections 8(a)(1) and 8(a)(3) of the Act.

The evidence establishes that Director of Nursing Nelson issued Thimot a written warning on October 15, 2002 for a number of serious failings in patient care. Most notably she left incontinent patients soaked with urine without changing them.

I reject this as implausible, the argument that

because the patients were on diuretic medication there was no way to keep all of them dry to the end of the shift.

That might be true with respect to one patient, but when a number of patients are all wet, it becomes clear that the CNA has not been doing her duty.

Performing a Wright Line analysis similar to that for Paragraph 7a, I conclude that the General Counsel has proven all four Wright Line elements. However, I further conclude that Respondent would have given a warning to any CNA who let patients lie in their own urine.

Considering that Respondent has a five star rating, the highest by the authority which accredits nursing homes, and considering that Thimot's immediate supervisor, Tanya Conley, was a diligent nurse who imposed high standards on her staff, I have no doubt that Thimot would have received a written warning in any event.

Therefore, I recommend that the Board dismiss the allegations in Complaint Paragraph 7b.

C O N C L U S I O N

When the transcript of this proceeding has been prepared, I will issue a certification, which attaches as an appendix to the portion of this transcript reporting this Bench Decision.

This certification also will include provisions relating to the findings of fact, conclusions of law, remedy, Order and Notice.

When that certification is served upon the parties,

the time period for filing an appeal will begin to run.

The hearing is closed. Off the record.

Thank you all very much.

(Whereupon, at 2:59 p.m., the hearing in the above entitled matter was concluded.)

CERTIFICATION

This is to certify that the attached proceedings before the National Labor Relations Board (NLRB), Region 12, in the matter of **JUPITER MEDICAL CENTER PAVILION,** Case No. 12-CA-22478, et al., taken by telephone conference, on August 21, 2003, were held according to the record, and that this is the original, complete, true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.

_____

Edna Hollander

Official Reporter/Transcriber

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT promulgate, maintain or enforce any rule prohibiting employees from wearing buttons or insignia or otherwise expressing their support for a labor organization when such employees are not engaged in patient care or in a patient care area in our facility.

WE WILL NOT selectively apply a no–solicitation rule to prohibit advocacy for or expressions of opinion about a labor organization, either by the wearing of buttons or insignia or otherwise, while allowing such expressions of support or opinion concerning other issues or organizations.

WE WILL NOT promulgate, maintain or enforce any rule prohibiting employees from discussing their wages, hours, or other terms and conditions of employment.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind our no–solicitation rule which prohibits employees from wearing buttons or otherwise expressing their support for or opinions about a labor organization in nonpatient care areas.

WE WILL, should we adopt a lawful no–solicitation rule, apply it in a manner which does not treat expressions of support for or opinions about a labor organization in any less favorable manner than similar communications concerning any other topic.

WE WILL rescind our unlawful rule prohibiting employees from discussing their wages with others.

WE WILL modify our employee handbook and any other announcements of employment policy to reflect that these rules have been rescinded.

JUPITER MEDICAL CENTER PAVILION
(EMPLOYER)

Dated: _____ By: _____
(Respondent) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

South Trust Plaza – Suite 530, 201 East Kennedy Blvd., Tampa, FL 33602–5824

(813) 228–2641, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228–2662.